

## **CHAPTER I. HISTORY AND PURPOSE OF THE FEDERAL TORT CLAIMS ACT (FTCA)**

The Federal Tort Claims Act is the product of an over thirty year debate regarding the responsibility of the United States to victims of its torts.<sup>1</sup> This debate resulted in a limited waiver of sovereign immunity for tort liability.<sup>2</sup> By allowing claims against the government, the FTCA eliminated thousands of requests to Congress for private legislative relief arising out of government torts. Chapter 4 of Army Regulation 27-20<sup>3</sup> implements the FTCA for the Department of the Army.

Under the FTCA, the United States is liable for the acts of its employees “in the same manner and to the same extent as a private individual under like circumstances.”<sup>4</sup> Subject to certain exceptions and limitations, the FTCA provides for the payment of money damages, for injury or loss of either real or personal property or for personal injury or death, caused by a wrongful or negligent act or omission, of an employee of the United States, acting within the scope of employment, where the United States, if a private person, would be liable, according to the law of the place where the act or omission occurred.

Two factors distinguish the FTCA from other governmental claims acts. First, there is no dollar limitation on liability. Multi-million dollar judgments have been obtained against the

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<sup>1</sup> See generally L. JAYSON, HANDLING FEDERAL TORT CLAIMS, §§ 2.01-2.14, (1998).

<sup>2</sup> The FTCA appears at 28 U.S.C. §§ 2671-2680 (1994). (See Appendix B to this publication.) The grant of jurisdiction to the federal courts appears at 28 U.S.C. § 1346(b) (1994). (See Appendix A to this publication.)

<sup>3</sup> DEP’T OF ARMY REG. 27-20, LEGAL SERVICES: CLAIMS (31 December 1997) [hereinafter AR 27-20].

<sup>4</sup> 28 U.S.C. § 2674 (1994).

United States.<sup>5</sup> Second, the FTCA provides an administrative and a judicial remedy. A claimant must first present a claim to the federal agency whose activities gave rise to the injuries and allow the agency an opportunity to settle the claim.<sup>6</sup> If the agency denies the claim, takes no action on the claim, or offers an amount that is unsatisfactory, the claimant may bring suit against the United States in a federal district court.<sup>7</sup>

The FTCA is the most comprehensive waiver of the government's tort immunity on the books, but it is a limited waiver of sovereign immunity. The FTCA allows suits only for certain types of tort actions; negligently inflicted injuries are generally actionable while most intentional torts are not.<sup>8</sup> Further, unlike most state tort actions, FTCA claimants may not recover punitive damages and prejudgment interest from the United States.<sup>9</sup> Additionally, FTCA lawsuits are

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<sup>5</sup> See, e.g., *Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994), *vacated, reh'g en banc granted*, 28 F.3d 1076 (11th Cir. 1994) (\$14 million); *Reilly v. United States*, 665 F. Supp. 976 (D.R.I. 1987) (\$11 million), *modified*, 863 F.2d 149 (1st Cir. 1988); *Hull by Hull v. United States*, 971 F.2d 1499 (10th Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993) (8.1 million); *Murphy v. United States*, 833 F. Supp. 1199 (E.D. Va. 1993), *aff'd*, 836 F. Supp. 350 (E.D. Va. 1993) (3.5 million); *Phillips v. United States*, 801 F. Supp. 337 (D. Idaho 1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1994) (7.7 million).

<sup>6</sup> 28 U.S.C. § 2675 (1994).

<sup>7</sup> After the agency has had the claim for six months and has failed to settle or deny it, the claimant may, at his option, deem the claim denied and file suit in federal court. 28 U.S.C. § 2675(a) (1994). If the agency notifies the claimant by certified or registered mail of its decision to deny the claim, the claimant must file suit within six months of the date of mailing of the letter or the action will be forever barred. 28 U.S.C. § 2401(b) (1994); 28 C.F.R. § 14.9(b) (1996); *Lambert v. United States*, 44 F.3d 296 (5th Cir. 1995); *Taumby v. United States*, 902 F.2d 1362 (8th Cir. 1990), *vacated*, 919 F.2d 69 (8th Cir. 1990); *Parker v. United States*, 935 F.2d 176 (9th Cir. 1991).

<sup>8</sup> 28 U.S.C. § 2680(h) (1994). Not all intentional torts are barred, however. See, e.g., *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994) (intentional infliction of emotional distress not barred). See also *Santiago-Ramirez v. Secretary of Dep't of Defense*, 984 F.2d 16 (1st Cir. 1993), *aff'd*, 62 F.3d 445 (1st Cir. 1995); *Kohn v. United States*, 680 F.2d 922, (2d Cir. 1982); *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982); *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990), *modified*, 917 F.2d 424 (9th Cir. 1990).

<sup>9</sup> 28 U.S.C. § 2674 (1994).

tried in federal district court without a jury<sup>10</sup> rather than before a jury as provided at common law and embodied in the Seventh Amendment.<sup>11</sup>

The requirement to file an administrative claim is a jurisdictional prerequisite to suit under the FTCA; the claimant must file the administrative claim with the agency and allow the agency at least six months to adjudicate the claim before filing a lawsuit against the United States.<sup>12</sup> Upon filing the lawsuit, the plaintiff's recovery is limited to the amount claimed administratively unless there is proof of newly discovered evidence or intervening facts relating to the amount of the claim.<sup>13</sup> While the substantive law of the place where the act or omission occurred governs the liability of the United States,<sup>14</sup> the FTCA has its own statute of limitations.<sup>15</sup> Special venue provisions also dictate where the action may be brought.<sup>16</sup> Attorney fees are limited by the FTCA to 20% of an administrative settlement and to 25% of a judgment or compromise settlement.<sup>17</sup>

This text will briefly review the essential aspects of the FTCA as they relate to the military.

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<sup>10</sup> 28 U.S.C. § 2402 (1994).

<sup>11</sup> U.S. CONST. amend. VII.

<sup>12</sup> 28 U.S.C. § 2675(a) (1994). *See* McNeil v. United States, 508 U.S. 106 (1993) (holding that a district court lacks jurisdiction over a lawsuit filed before proper filing of an administrative claim under the FTCA).

<sup>13</sup> 28 U.S.C. § 2675(b) (1994). *See, e.g.,* Corte-Real v. United States, 949 F.2d 484 (1st Cir. 1991) (limiting damages in lawsuit to \$100,000 when administrative claim requested “approximately \$100,000.”); Cole v. United States, 861 F.2d 1261 (11th Cir. 1988) (allowing a substantial increase in damages sought based on an unexpected increase in the severity of the injuries).

<sup>14</sup> 28 U.S.C. § 1346(b) (1994).

<sup>15</sup> 28 U.S.C. § 2401(b) (1994).

<sup>16</sup> 28 U.S.C. § 1402(b) (1994).

<sup>17</sup> 28 U.S.C. § 2678 (1994).